

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

<b>PETER ANDERSON,</b>	)	
	)	
Plaintiff,	)	Civil No. 1996-118
	)	
v.	)	
	)	
<b>GOVERNMENT OF THE VIRGIN ISLANDS</b>	)	
<b>d/b/a VIRGIN ISLANDS POLICE</b>	)	
<b>DEPARTMENT et al.,</b>	)	
	)	
Defendants.	)	
	)	

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**MEMORANDUM**

This matter came before the Court on August 31, 1999, for oral argument on the following motions: Defendant Roy L. Schneider's ["Schneider"] Motion for Summary Judgment, Plaintiff Peter Anderson's ["Anderson"] Motion for a Continuance and Sanctions, Defendant Ramon Davila's ["Davila"] Motion for Summary Judgment, and the defendants'<sup>1</sup> Motion for a Protective Order. The Court also heard argument on Davila's pending Affidavit of Costs and Fees submitted in response to the Court's ruling of June 9, 1998, awarding costs and fees to Davila as sanctions for plaintiff's counsel's failure to comply with the requirements of Federal Rule of Civil Procedure 45.

The Court reserved ruling on the final motion argued, Davila's Motion to Dismiss Count IV of the Third Amended Verified

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<sup>1</sup> This motion was made on behalf of all the defendants in this matter: Government of the Virgin Islands d/b/a Virgin Islands Police Department, Ramon Davila, Kenneth Mapp, Robert Soto, Elton Lewis, Derek Hill, and Roy L. Schneider.

Complaint, pending further submissions to the Court by the parties. The following memorializes the Court's rulings on the remaining motions as made at the hearing on August 31, 1999.

# **I. Defendant Schneider's Motion for Summary Judgment**

Schneider presented several arguments in support of his motion for summary judgment. They were as follows: Schneider, Governor of the Virgin Islands at all times relevant in Anderson's complaint, is absolutely immune from all of Anderson's claims; he enjoys qualified immunity if not absolute; he acted within his official capacity as Governor and is thus immune; he is protected by a deliberative process privilege; he is entitled to executive immunity; and he did not act with malice against Anderson and so cannot be held liable. Anderson rejected all of Schneider's arguments, contending that he failed to establish his entitlement to any of these immunities or privileges. Most significantly, Anderson argued that Schneider was subject to supervisory liability under 42 U.S.C. § 1983.

As developed in the case law of the Third Circuit, "[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor "acquiesced" in (i.e., tacitly assented

to or accepted) the subordinate's conduct." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997). A supervisor who "acquiesces" can be held liable under section 1983. Then Governor Schneider directly supervised the Narcotic Strike Force ["NSF"] of which Davila and several of the other defendants were members. Accordingly, if Schneider knew that members of the NSF were violating the civil rights of Anderson and he failed to take any action to stop the violations, Schneider cannot escape liability under section 1983.

The Court does not need to reach the question of whether Schneider took adequate steps to investigate, prevent, or stop the alleged wrongful activities of the NSF against Anderson, because Anderson has failed to demonstrate that Schneider was aware of the allegedly wrongful activity before the filing of Anderson's complaint. The case of *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997), cited by Anderson,<sup>2</sup> is

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<sup>2</sup> The plaintiff also cited and referred at argument to the case of *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1988). *Stoneking*, however, is distinguishable from this matter. In *Stoneking*, the plaintiff pointed to repeated occurrences of reported wrongful activity by several teachers employed by the school district such that it rose to a level of a pattern and practice of conduct, as evidence that the school principal and others had sufficient notice to subject them to section 1983 liability. The question before the court was whether the defendants' failure to take action was objectively reasonable given the reported previous occurrences. In the case at bar, the plaintiff has not indicated any notice given to Schneider before the filing of his complaint. Furthermore, Anderson has not made an argument that, even if Schneider lacked specific knowledge of wrongful NSF activity against Anderson, there was such a pattern and practice of wrongful activity that he should have known.

directly on point. In *Robinson*, a female police officer sued the assistant chief of police and the chief of police, among others, for their failure to take action against a fellow male police officer who was sexually harassing her. Affirming the district court's grant of judgment as a matter of law to both the assistant chief of police and the chief of police, the United States Court of Appeals for the Third Circuit found that the assistant chief of police could not be held liable under section 1983 because he did not have any supervisory authority over the male police officer accused of harassment. *Id.* at 1295. The court did find, however, that the chief of police had supervisory authority over the male officer but found that the chief was not aware of any wrongful activity until the filing of the complaint. Lacking this evidence, the Third Circuit held that the chief of police could not be found liable under the supervisory authority theory. *Id.*

Similarly, although we accept Anderson's contention that Schneider had supervisory authority over the activities and members of the NSF for the purpose of this motion, Anderson has failed to demonstrate, and the Court cannot find, any evidence indicating that Schneider was aware of Anderson's allegations

until the filing of the complaint in September, 1996.<sup>3</sup>

Accordingly, Schneider cannot be held liable under section 1983 and the Court will grant Schneider's motion for summary judgment.

## **II. Plaintiff's Motion for Continuance and for Sanctions**

The plaintiff and Davila are once again in dispute over discovery issues, this time over deposing Davila. Anderson, arguing that Davila and his counsel have sought to prevent the plaintiff from taking Davila's deposition, asked this Court to delay its review of Davila's pending motion for summary judgment because Davila's deposition was necessary for a full response to the summary judgment motion. The plaintiff also requested sanctions be assessed against Davila in the amount of any costs arising from the granting of the continuance.

Anderson already had filed his opposition to Davila's motion for summary judgment, however, in which he had made no mention that Davila's deposition was critical to his response. Moreover, Davila made the usual arguments that plaintiff's counsel did not comply with the applicable regulations for deposing Davila in his

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<sup>3</sup> As part of his opposition to Schneider's motion, the plaintiff did include a letter dated May 18, 1995, addressed to Governor Schneider and signed by plaintiff's counsel, Lee J. Rohn, which contains allegations that the Virgin Islands Police Department was conducting an illegal investigation of Attorney Rohn. The letter makes no reference to the plaintiff, Peter Anderson. (See Plaintiff's Opp'n to Def. Roy Schneider's Mot. for Summ. J. Ex. 5.)

present position with the United States Customs Service. After argument, plaintiff's motion for a continuance and for sanctions was denied.

### **III. Davila's Motion for Summary Judgment**

Davila argued that he was immune from liability for Anderson's claims, that Anderson has failed to establish valid claims to intentional infliction of emotional distress, defamation, common law privacy, and that Anderson has failed to show that Davila proximately caused any of Anderson's alleged damages.

In its opinion of November 21, 1997, upon the defendants' motion to dismiss, the Court previously ruled that Davila was not immune from liability in this matter. Davila failed to present any new evidence or argument that persuades the Court to alter its previous findings. Accordingly, Davila's claims of immunity are denied as a matter of law but remain as a factual issue properly reserved for the jury. Davila's remaining arguments raised in his motion for summary judgment likewise are issues of fact that must be resolved by the trier of fact. For these reasons, the Court has denied Davila's motion for summary judgment.

#### **IV. Defendants' Motion for a Protective Order**

The plaintiff requested that the Virgin Islands Police Department produce the employment records of Elton Lewis, Ramon Davila, Derek Hill, Robert Soto, Achilles Tyson, Jay Watson, Esbond deGrasse, Christopher Howell, Ron Hatcher, Steve Walcott, and Peter Anderson. The defendants' objected to this request on numerous grounds. To resolve this discovery dispute, the parties agreed to draft a protective order modeled on protective order utilized in the matter of *Susan Miller v. Government of the Virgin Islands*, Civ. No. 1998-089 (St. Croix Div. Aug. 24, 1999). Magistrate Judge Barnard will oversee the protective order and the subsequent production of relevant documents, if any.

#### **V. Davila's Affidavit of Fees and Costs**

In the Court's Memorandum Opinion and Order of June 9, 1998, in this matter, the Court ordered that plaintiff's attorney be sanctioned in an amount equal to Davila's costs and attorney's fees associated with quashing several subpoenas directed to the United States Customs Service. (See Order at 2 (June 9, 1998).) Davila subsequently submitted an affidavit outlining the associated fees and costs for an amount totaling \$4,060.00. Davila included in this amount, however, the charges for an attorney who is admitted in other jurisdictions but has not been

licensed to practice law in the Virgin Islands. Accordingly, the Court will not include his charges in the sanctions. After reviewing the affidavit for the fees due directly to Davila's Virgin Islands counsel, the Court will award the amount of \$900.00.

Upon the suggestion by plaintiff's counsel that this sanction was payable by her client, the Court indicated at the hearing that it would not be due until after this matter was resolved in its entirety, due to the financial burdens of costs and counsel fees already incurred by plaintiff. This was in error. This sanction is to be paid by plaintiff's counsel as was ordered in the Court's June 9, 1998, ruling. (See Memorandum Opinion at 19-20 (June 9, 1998) ("[T]he Court will sanction Attorney Rohn . . . .").) As discussed in that earlier Memorandum Opinion, the broadened powers given attorneys by the 1991 Amendments to Rule 45 of the Federal Rules of Civil Procedure were counterbalanced by the inclusion of heightened protections and procedural requirements. The inclusion of these protections and additional procedural requirements was intended to prevent attorneys from abusing the subpoena process in the exact manner it was abused by Attorney Rohn. Since plaintiff's counsel chose to ignore the procedural requirements and abused the subpoena process, she made herself subject to the sanctions



allowed for in the rule. Furthermore, Attorney Rohn also chose to ignore the requirements of the Code of Federal Regulations when attempting to procure Davila's personnel file from the United States Customs Service, even after she had been advised of the necessary requirements by the Customs Service.

Accordingly, this sanction was assessed against Attorney Lee Rohn and is due and payable now. Giving Attorney Rohn the benefit of the doubt by assuming she was merely confused when she suggested at the hearing that the sanction was payable by Mr. Anderson, the Court will permit Attorney Rohn to file a response arguing why this is not an appropriate sanction against her and Davila may file his reply. Attorney Rohn will have ten days from the issuance of this Memorandum to file her objections. Davila will have ten days thereafter to file his reply.

## **VI. Conclusion**

For the reasons stated at the hearing and as memorialized above, the Court will grant Schneider's motion for summary judgment, deny the plaintiff's motion for a continuance and for sanctions, deny Davila's motion for summary judgment, refer the matter of the protective order regarding the personnel files of the Virgin Islands Police Department to Magistrate Judge Barnard, and will allow Attorney Rohn to supplement her objections to the

Court's imposition of a \$900 sanction against her for her failure to follow Federal Rule of Civil Procedure 45, and for other subpoena process abuses.

As noted at the hearing, the Court reserved ruling on Davila's motion to dismiss Count IV of the Third Amended Verified Complaint. The Court, however, will dismiss defendants Hill, Lewis, and Soto from this Count as plaintiff conceded that they are not identified in any of the allegations of defamation. An appropriate order shall issue.

**ENTERED this 3rd day of September, 1999.**

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**ORINN ARNOLD**  
**Clerk of the Court**

**By: \_\_\_\_\_**  
**Deputy Clerk**

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	)	
Defendants.	)	
	)	

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**ORDER**

For the reasons set forth in the accompanying Memorandum of even date, it is hereby

**ORDERED** that Defendant Schneider's Motion for Summary Judgment is **GRANTED**;

**ORDERED** that Plaintiff's Motion for Continuance and for Sanctions is **DENIED**;

**ORDERED** that Defendant Davila's Motion for Summary Judgment is **DENIED**;

**ORDERED** that Defendants Hill, Lewis, and Soto are **DISMISSED** from Count IV of the Third Amended Verified Complaint;

**ORDERED** that the parties shall draft a protective order modeled after that utilized in the matter of *Miller v. Government of the Virgin Islands*, Civ. No. 1998-089 (St. Croix Div.) before the plaintiff may obtain any personnel files from the Virgin Islands Police Department. Magistrate Judge Barnard shall

oversee the production of any relevant documents. And it is further

**ORDERED** that Attorney Lee Rohn, Esquire, may supplement her objections to the Court's finding that she be sanctioned in the amount of \$900, payable immediately, for her failure to follow Federal Rule of Civil Procedure 45 and for other related subpoena process abuses. Attorney Rohn must file any such objections no later than September 17, 1999 and defendant Davila will file his reply, if any, no later than October 1, 1999.

**ENTERED this 3d day of September, 1999.**

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**ORINN ARNOLD**  
**Clerk of the Court**

**By:** \_\_\_\_\_  
**Deputy Clerk**

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